STATE OF MICHIGAN

COURT OF APPEALS

CHRISTINE BLUE, Plaintiff-Appellee,	UNPUBLISHED October 13, 2009
v	No. 284769 Wayne Circuit Court
ST. JOHN HOSPITAL AND MEDICAL CENTER, Defendant-Appellant.	LC No. 06-609722-NO

Before: Stephens, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

In this premises liability action, defendant appeals by leave granted the circuit court's order denying its motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand for entry of judgment in favor of defendant.

Plaintiff initiated this action after she sustained injuries when she slipped and fell on snow-covered ice in defendant's parking structure. On appeal, defendant argues that the circuit court erred by denying its motion for summary disposition because it lacked notice of the alleged snowy and icy conditions that caused plaintiff's injury, because such conditions were open and obvious, and because it had no duty to remove the snow and ice while it was still snowing.

Summary disposition is properly granted under MCR 2.116(C)(10) when there remains no jury-submissible question of material fact and the moving party is entitled to judgment as a matter of law. We review de novo a circuit court's grant or denial of a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). When reviewing a motion brought under MCR 2.116(C)(10), we consider the pleadings, admissions, and other evidence submitted by the parties in a light most favorable to the nonmoving party. *Id*. We limit our review to the evidence presented to the circuit court at the time the motion was decided. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

"To establish a prima facie case of negligence, a plaintiff must prove: (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach caused the plaintiff's injuries, and (4) the plaintiff suffered damages." *Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 60; 680 NW2d 50 (2004). An invitor "has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to . . . inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any

discovered hazards." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000).

The parties do not dispute plaintiff's status as an invitee when she slipped and fell in defendant's parking lot. Plaintiff testified that on the morning of the incident, she accompanied her friend, Cathy Warrick, to a doctor's appointment at defendant's hospital. When they arrived at the hospital, plaintiff dropped Warrick off at the door and then parked her vehicle in defendant's parking structure.

An invitor is liable for injury resulting from an unsafe condition either caused by the active negligence of himself and his employees or, if otherwise caused, where known to the invitor or is of such a character or has existed a sufficient length of time that he should have had knowledge of it. *Hampton v Waste Mgmt of Mich, Inc*, 236 Mich App 598, 604; 601 NW2d 172 (1999). Turning to the present case, there is simply no evidence in the record to establish that defendant or its employees caused the ice to form beneath the snow. Likewise, there is no evidence that defendant had *actual* knowledge of the ice beneath the snow. Therefore, the question presented here is whether defendant had *constructive* notice of a dangerous condition on its premises.

Plaintiff argues that the winter weather conditions should have placed defendant on constructive notice that ice had formed in its parking lot. In contrast, defendant relies on *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 706-707; 644 NW2d 779 (2002), in which the defendant had no notice of icy conditions in its parking lot where "it had not snowed for several days, had only rained a few hours before reverting to freezing temperature[s]," and no other person, including the plaintiff, had observed the relatively small ice patch *before* the plaintiff fell.

In this case, plaintiff testified that it began to snow overnight and that when she woke up that morning, the temperature was cold. Plaintiff stated that she observed heavy snowfall, significant winds, and blowing snow that morning. At about 7:00 or 7:30 a.m., approximately two inches of snow had already accumulated on plaintiff's vehicle. According to plaintiff's testimony, the weather conditions in this case differ from those at issue in *Derbabian*. However, plaintiff could not establish how long the ice patch had existed before she fell. Therefore, as in *Derbabian*, plaintiff has not shown that the ice patch existed long enough that defendant should have had knowledge of it.

Plaintiff also argues that defendant's facilities remained open to its patrons during the snowstorm and that defendant therefore should have been more diligent in discovering the ice before she arrived. But this argument requires conjecture. "[I]f the evidence lends equal support to inconsistent conclusions or is equally consistent with contradictory hypotheses, negligence is not established. In other words, we cannot permit the jury to guess." *Karbel v Comerica Bank*, 247 Mich App 90, 98; 635 NW2d 69 (2001) (quotation marks, citations, and emphasis omitted). Even if there was ice beneath the snow, there was no evidence to establish *how long* it had been present. Accordingly, any jury would have been required to merely speculate concerning whether the ice had existed long enough that defendant should have discovered it. We cannot conclude that defendant had constructive notice of the snow-covered ice.

But even assuming arguendo that the weather conditions placed defendant on constructive notice, summary disposition should have been granted in favor of defendant because plaintiff failed to raise a genuine issue of material fact regarding whether the alleged snow-covered ice was open and obvious and whether the snow-covered ice presented any special aspects that would preclude application of the open and obvious danger doctrine.

Generally, an invitor is not required to protect an invitee from open and obvious dangers. This is because when the potentially dangerous condition is wholly revealed by casual observation, the duty to warn serves no purpose. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 478; 760 NW2d 287 (2008). A condition is open and obvious if an average user of ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. *Id.* at 478-479. However, when the condition is effectively unavoidable, or when the condition imposes an unreasonably high risk of severe harm, the condition is said to bear "special aspects" that reinstate the invitor's duty to undertake reasonable precautions to protect invitees from the open and obvious danger. *Id*.

Plaintiff argues that the snow-covered ice was not open and obvious because an average person of ordinary intelligence could not have perceived it in time to avoid the danger. Plaintiff testified that she drove into defendant's parking structure and parked her vehicle in the first available space. Plaintiff then exited her vehicle and proceeded to walk down the ramp. Plaintiff observed that the entire ramp was covered with snow. However, plaintiff did not notice any ice underneath the snow. While walking and carrying Warrick's son in her arms, plaintiff encountered a slippery surface at the bottom of the ramp, which caused her to slip and fall to the ground. While on the ground, plaintiff observed the ice underneath approximately one and a half inches of snow. Plaintiff testified that she pushed aside some of the snow to uncover more of the ice because she wanted to determine why she had fallen.

In *Ververis v Hartfield Lanes (On Remand)*, 271 Mich App 61, 67; 718 NW2d 382 (2006), this Court held as a matter of law that "a snow covered surface presents an open and obvious danger because of the high probability that it may be slippery," and that the presence of snow should alert a reasonable Michigan resident of the possibility that ice may have formed below the surface. Here, plaintiff testified that she could see snow covering the entire ramp as she walked from her vehicle toward defendant's hospital. Although plaintiff did not see any ice until *after* she fell, the presence of snow was a sufficient warning of the high probability that the surface was slippery. *Id.*; see also *Royce v Chatwell Club Apartments*, 276 Mich App 389, 394; 740 NW2d 547 (2007).

Plaintiff argues that the snow-covered ice presented "special aspects" because it was effectively unavoidable and imposed an unreasonably high danger of severe harm. In *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 514; 629 NW2d 384 (2001), the plaintiff fell after stepping into a pothole in the defendant's parking lot. The plaintiff's recovery was precluded by the open and obvious danger doctrine because she did not establish that the pothole presented special aspects that created an unreasonable risk of harm. In *Lugo*, the Supreme Court illustrated conditions that presented special aspects, such as "a commercial building with only one exit for the general public where the floor is covered with standing water" or "an unguarded thirty foot deep pit in the middle of a parking lot." *Id.* at 518. While both of these types of hypothetical conditions would be open and obvious, the risk of harm would remain unreasonable, despite their

obviousness. *Id.* at 516-517. Consequently, in each scenario, the invitor would retain a duty to protect an unsuspecting invitee from the unreasonable danger.

Plaintiff contends that even if the snow-covered parking lot was open and obvious, it would have been impossible to detect the presence of ice beneath the snow. According to plaintiff's testimony, she alighted from her vehicle without incident. Plaintiff took several steps down the snow-covered ramp before encountering the hidden ice that caused her fall. Plaintiff argues that she could not have avoided the danger presented by the snow-covered ice because a uniform blanket of snow covered the parking lot. She also contends that she walked along the most direct path from her vehicle to defendant's pedestrian bridge.

Unlike the hypothetical dangers presented in *Lugo*, plaintiff did not encounter a condition that was "effectively unavoidable" in the instant case. Plaintiff's path through the snow-covered parking structure was not the only path available to her. It is undisputed that plaintiff could have taken other stairwells to reach defendant's hospital. Although plaintiff maintains that the weather conditions were blizzard-like and that the entire parking structure was covered with snow, she presented no evidence to the circuit court to establish that the other routes available to her were also underlain by slippery ice. With no evidence that these other routes presented the same slipping hazard as was presented by the route plaintiff actually took, we simply cannot conclude that the condition was effectively unavoidable. Nor can we conclude that plaintiff faced an "unreasonably dangerous" condition. Citing numerous statistics, plaintiff challenges the logic underlying our case law holding that falling from a standing position does not present an unreasonably high risk of harm. However, contrary to plaintiff's argument, slipping on snow and ice during a snowstorm simply does not present a "uniquely high likelihood" of severe harm. *Id.* at 518-519. The risk presented by the snow-covered ice in this case was open and obvious, and no special aspects made the condition "effectively unavoidable" or "unreasonably dangerous."

We note that defendant contends that it had no duty to protect plaintiff from the hazard presented by the snow-covered ice in its parking lot because plaintiff fell while the snow continued to fall. In support of its argument, defendant cites *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332; 683 NW2d 573 (2004), in which our Supreme Court stated:

> Under *Lugo*, a premises possessor must protect an invitee against an "open and obvious" danger only if such danger contains "special aspects" that make it "unreasonably dangerous."
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> Thus, in the context of an accumulation of snow and ice, *Lugo* means that, when such an accumulation is "open and obvious," a premises possessor must "take *reasonable measures within a reasonable period of time after the accumulation of snow and ice* to diminish the hazard of injury to [a plaintiff]" only if there is some "special aspect" that makes such accumulation "unreasonably dangerous." [Emphasis added.]

Similarly, in *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244, 261; 235 NW2d 732 (1975), our Supreme Court noted:

> While the invitor is not an absolute insurer of the safety of the invitee, the invitor has a *duty to exercise reasonable care to diminish the hazards of ice and snow accumulation*. . . . As such duty pertains to ice and snow accumulations, it will require that *reasonable measures be taken within a reasonable time after an accumulation of ice and snow* to diminish the hazard of injury to the invitee. [Emphasis added.]

Whether measures are reasonable within the meaning of *Mann* and *Quinlivan* depends upon the circumstances presented in each case. In some cases a warning may suffice, whereas other circumstances may require affirmative action by the invitor. In this case, plaintiff testified that two inches of snow had already accumulated before she departed from her house at approximately 7:00 or 7:30 a.m. While walking through defendant's parking lot, plaintiff observed the accumulated snow, and therefore knew or should have known that there was a likelihood of icy or slippery conditions underneath the snow cover. On the particular facts of this case, we cannot conclude that defendant acted unreasonably by waiting until the blizzard-like snowstorm had stopped before removing the snow from its parking structure or warning its invitees of the potentially dangerous condition. See *Ververis*, 271 Mich App at 67.

In sum, plaintiff has failed to establish that defendant had notice of the hazard presented by the snow and ice in its parking lot, that the condition was not open and obvious, and that the condition presented special aspects that would preclude application of the open and obvious danger doctrine. Considering the record evidence in a light most favorable to plaintiff, we perceive no disputed material facts. Defendant was entitled to judgment as a matter of law.[1]

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction. As the prevailing party, defendant may tax costs under MCR 7.219.

/s/ Kathleen Jansen
/s/ Kurtis T. Wilder

[1] We note that plaintiff has also argued that even if the icy condition was open and obvious, defendant had an independent duty to clear the ice from its parking area under a city of Detroit ordinance. However, although such ordinances create a public duty, there is no private right of action for their enforcement. *Taylor v Saxton*, 133 Mich App 302, 306; 349 NW2d 165 (1984).